89-1885

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THAIS CARRIERE, INDIVIDUALLY AND ON BEHALF OF RICHARD DARCEY CARRIERE, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIERE TOMENY, THAIS MARIE CARRIERE AND CLAYTON JOSEPH CARRIERE,

Petitioners,

VS.

SEARS, ROEBUCK & COMPANY, SIZELER REALTY COMPANY, SIZELER REAL ESTATE MANAGEMENT COMPANY, INC., CONNECTICUT GENERAL LIFE INSURANCE COMPANY, ON BEHALF OF ITS SEPARATE ACCOUNT R, WILLIAM MCINNIS AND ALLSTATE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Is it appropriate for a federal court to combine a motion to remand a removal case with a motion for summary judgment when the only legitimate issue before the court is an allegation of fraudulent joinder of a non-diverse defendant?

II.

Is it appropriate for a federal court to require a state court plaintiff to choose between developing summary judgment data and possibly losing the right to remand a removal case, or to expedite the motion to remand at the risk of having to defend a summary judgment without sufficient factual preparation?

III.

Is it appropriate for a federal court to ignore issues of economy, convenience, fairness and comity by precipitously converting a motion to remand into a summary judgment thereby divesting the state court of its rightful jurisdiction?

IV.

Did the court below err in its application of Louisiana law, and the standard to test removal/remand, on the facts and pleadings presented?

INTERESTED PARTIES

Sears, Roebuck and Company

Sizeler Real Estate Management Company, Inc.

Sizeler Realty Company

William McInnis

Connecticut General Life Insurance Company, on behalf of its separate account R

Allstate Insurance Company

Thais Carriere, individually and on behalf of Richard Darcy Carriere, Samuel Carriere, V, Leanora Paige Carriere Tomeny, Thais Maire Carriere and Clayton Joseph Carriere

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OPINIONS BELOW

The Fifth Circuit Court of Appeals in its opinion (reproduced as Appendix dated February 2, 1990 and cited as Carriere v. Sears, Roebuck and Co., No. 89-3089, slip op. at 1871 (5th Cir. Feb. 2, 1990), affirmed the judgment of the United States District Court for the Eastern District of Louisiana (reproduced as Appendix B-2) dated January 6, 1989 wherein the district court rendered a summary judgment against Thais Carriere,

et al and affirmed that summary judgment procedure was properly subsumed into the question of remand and that the employee was fraudulently joined to defeat federal jurisdiction; real estate management company was fraudulently joined to defeat federal jurisdiction; denial of motion for continuance to conduct discovery before hearing on summary judgment motions was not abuse of discretion; and owner of adjacent business premises did not have duty to protect security supervisor from risk of criminal harm.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). Petitioners seek a writ of certiorari to review the decision of the Fifth Circuit dated February 2, 1990, the petition for rehearing of which was denied by an order dated March 2, 1990.

STATEMENT OF THE CASE

This action arose out of the murder of Samuel Carriere, IV while employed as an unarmed security guard at the Sears, Roebuck and Company store located in the Lake Forest Shopping Mall, New Orleans, Louisiana. The original Petition for Damages was filed in the Civil District Court in the Parish of Orleans against diverse and non-diverse defendants. Subsequently, the case was removed to the United States District Court for the Eastern District of Louisiana on grounds of fraudulent joinder of non-diverse defendants. The district court denied petitioners' Motion to Remand and granted summary judgment "subsumed in the opposition to remand" to one of the non-diverse defendants and summary judgment to one of the diverse defendants. The district court, thereafter, dismissed the other non-diverse defendant for failure of petitioners to serve timely under the federal rules and granted summary judgment to all other defendants. The Fifth Circuit approved the method of subsuming the summary judgment procedure into remand procedure and affirmed the district court.

The Fifth Circuit denied petitioners' Motion for Rehearing.

STATEMENT OF THE FACTS

The deceased, Samuel Carriere, IV, was murdered on February 2, 1987 at the Sears, Roebuck and Company ("Sears") store loading dock in New Orleans, Louisiana by unknown assailants. At the time of his death, Carriere was working as an unarmed security guard for Sears. Sizeler Realty Company and/or Sizeler Real Estate Management Company, Inc. ("Sizeler Interests") were the managers of the Lake Forest shopping mall where the Sears store was located. Connecticut General Life Insurance Company on Behalf of Its Separate Account R ("Connecticut General") was the owner of the shopping mall where the Sears store was located. William McInnis was an off-duty New Orleans Police Department officer working on special assignment for Sears at the Sears store where Carriere was murdered. Allstate Insurance Company was the alleged insurer of Sears and McInnis for the liability asserted in the lawsuit.

On February 3, 1988 the widow Thais Carriere individually, and on behalf of her five children, Richard, Samuel, V, Leanora, Thais and Clayton filed a petition for damages in the state court in New Orleans, Louisiana against Sizeler Interests, Sears, Connecticut General, McInnis and Allstate under purely state law theories of negligence and intentional tort. Sizeler Interests and McInnis are citizens of the State of Louisiana. Sears, Connecticut General and Allstate are foreign corporations domiciled outside the State of Louisiana.

On *March 7, 1988* Sears, Connecticut General and Allstate filed a Petition for Removal from the state court to the United States District Court for the Eastern District of Louisiana. On *March 24, 1988* based on the incomplete diversity of citizenship, petitioners moved to remand the case to the state court. On *April 12, 1988* Sears and Allstate filed their Opposition to the Motion to Remand attaching affidavits of McInnis, Gene Looper, Sears' Director of Security, Thurman Thomas, a Sears' store manager and Sandra Phillips, a manager for defendant, Allstate. This opposition to remand contended that McInnis and Sizeler Interests had been "fraudulently joined" and defendants supported this contention with the factual affidavits referred to

above. On *April 12, 1988* Sizeler Interests and Connecticut General filed an opposition to remand, adopting the position and argument of Sears and attaching the affidavit of Maurice Burke, general counsel for Sizeler Interests.

On *May 25, 1988* Sizeler Interests the non-diverse defendant filed a Motion for Summary Judgment attaching the affidavits of Joel Jacobs, a Sizeler vice president, Thurmon Williams, a Sears' employee, along with plot plans of the shopping mall and legal descriptions of the Sears site. These affidavits and exhibits pertained exclusively to factual issues. On *May 27, 1988* Sizeler Interests filed a Motion for Leave to consider their memorandum in support of their summary judgment a supplemental opposition to the motion to remand which was granted by the Court. The hearing on petitioners' Motion to Remand and defendant's Summary Judgment was set for *July 13, 1988*, approximately six weeks after the issue of fraudulent joinder and summary judgment were first pled by defendants. On *July 6, 1988* petitioners filed an Opposition to Summary Judgment attaching the affidavits of John Hance, a Sears' store engineer, Juan Woolfolk, a Sears' security employee, Addie Fanguy, a New Orleans Police Department detective and Betty Cox, a Sears' employee. These affidavits were filed in an attempt to hurriedly contest factual issues raised by defendants' affidavits. Additionally, counsel for petitioners filed a motion to continue the hearing with his attached affidavit setting forth the need for specific discovery and requesting an expedited hearing on this Motion.

On *July 13, 1988*, the morning of the hearing on the Motion to Remand and Sizeler's Motion for Summary Judgment, counsel for petitioners was served by hand with a motion to strike the affidavits attached to petitioners' Opposition to Summary Judgment on the grounds that three of the affidavits were not signed in the presence of the notary. The Court heard argument on July 13, 1988 and issued a Minute Entry on July 15, 1988 granting summary judgment in favor of Sears and Sizeler Interests and granting Sears' Motion to Strike the affidavits. The Court, according to its Minute Entry of August 29, 1988 mistakenly granted summary judgment to Connecticut General as well, which had never filed a motion and remanded a workmen's compensation claim which did not exist.

On *July 25, 1988* petitioners filed a motion for relief from the July 15th Minute Entry on the grounds that the Court did not consider or rule on petitioners' Motion to Continue for additional time to conduct discovery and that petitioners' affidavits should not have been stricken for technical deficiencies which only applied to three of the affidavits and could easily have been cured in those three. Furthermore, petitioners complained that they had not been given an opportunity to oppose the Motion to Strike which was served the morning of the hearing.

On *August 29, 1988*, without reasons, the Court denied petitioners' Motion for Relief.

On *October 31, 1988* the District Court dismissed the other non-diverse defendant, William McInnis for lack of service within one hundred and twenty days of the original complaint. The Court also dismissed Allstate on summary judgment at the same time.

On *September 26, 1988* the remaining defendant, Connecticut General, filed a Motion for Summary Judgment and on December 20, 1988 the Court granted that Motion.

On January 11, 1989 the Court entered final judgment against petitioners and petitioners appealed to the Fifth Circuit Court of Appeal. The Fifth Circuit affirmed the District Court. Petitioners sought rehearing which was denied and now seek review by the Honorable United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit Has Adopted A Procedure In Removal/Remand Cases That Threatens The Due Process Rights Of State Court Litigants And Threatens The Ordering Of Federal/State Relations In Diversity Jurisdiction Litigation

One hundred and sixty-nine days is not a very long time from start to end of a complex, multi-defendant personal injury case that resulted in the death of the plaintiffs' husband/father. It is especially not a very long time when the case started in state court by the choice of the plaintiffs and was removed to federal court where it ended by summary judgment shortly after removal and despite the presence of non-diverse defendants. All without affording plaintiffs anything like their day in Court.

This managed to happen because the district court, and ultimately the U.S. Fifth Circuit, made an unprecedented leap from an accepted procedure for testing fraudulent joinder claims, to one that burdened plaintiffs with a premature summary judgment that assured the swift termination of the case.

Specifically, the Fifth Circuit has, in this case, approved of combining the remand/fraudulent joinder determination with consideration of defendants' motions for summary judgment. In doing so, the Fifth Circuit distorted its own precedent in *B., Inc. v. Miller Brewing Company*, 663 F.2d 545 (5th Cir. 1981).

In *B., Inc.*, the Fifth Circuit approved, as had other circuits, a somewhat more expansive analysis of remand motions based upon fraudulent joinder of non-diverse parties. The procedure approved in *B., Inc.* was *analogized* to the summary judgment procedure:

> Thus, the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling

> on a motion for summary judgment under Fed. R. Civ. P., Rule 56(b).

663 F.2d at 549, n. 9 (emphasis added).

This similarity was obviously not intended to *be* a summary judgment. *B., Inc.* cited *Keating v. Shell Oil Company, Co.*, 610 F.2d 328 (5th Cir. 1980). *Keating*, for its part, approved of " 'piercing the pleadings' to determine if the joinder was fraudulent, that is, whether under any set of facts alleged in the petition, a claim against the defendants could be asserted under Louisiana law". 610 F.2d at 331. However, the entire thrust of *Keating* and its progeny is to determine if a cause of action has been alleged *not* whether plaintiff should prevail on the merits:

> Whether reference to state law amounts to "pre-trying" the case is always a question of degree. If there is any possibility that the facts the plaintiff alleges could support a claim, *then a dismissal under Rule 12(b)(6)* is improper. But when the lack of a state law claim is apparent, dismissal at this point in the proceedings does not constitute a premature trial on the merits.

610 F.2d at 331-32 (emphasis added).

Of course, a dismissal under Federal Rule 12(b)(6) is a vastly different matter than a summary judgment under Rule 56(b). Rule 12(b)(6) is used to test the sufficiency of the complaint, *not to decide the merits*. *See Barkman v. Wabash, Inc.*, 674 F. Supp. 623 (N.D. Ill., 1987). By definition, then, a 12(b)(6) dismissal is not a pretrial whereas a summary judgment is. *See Mandel v. U.S.*, 719 F.2d 963 (C.A. Ark. 1983).

Consequently, to confuse a "piercing of the pleadings" for testing a motion to remand with a full blown summary judgment threatens to divest casually a state court of its rightful jurisdiction *and* to deny state court litigants of their "day in court". *See Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962) (reversing

trial court and appellate court grant of summary judgment saying "the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try" at 468).

Practically the difference is quite significant. A dismissal under Rule 12(b)(6) in a remand case requires the plaintiff to demonstrate to the appellate court that the pleadings, even when "pierced" do state a sufficient claim under the controlling state's law. Whereas, a summary judgment locks the plaintiff into a record, insufficiently developed, that requires a demonstration of ultimate success on the merits.

The procedure adopted by the Fifth Circuit, in effect, railroads the plaintiff into a grossly premature defense of the merits of his case when the only issue should be the federal court's jurisdiction *vel non*.

The Fifth Circuit seemed to have misunderstood this distinction urged by plaintiffs. The court mischaracterized the plaintiff's position:

> In plaintiff's view, the district court should have accepted the factual allegations of the original state court petition and should not have considered affidavits and depositions in deciding the merits of the *motion to remand*.

Carriere v. Sears, Roebuck and Company, No. 89-3089, slip opinion at 1873 emphasis added).

Clearly, plaintiffs did not dispute such a procedure for "deciding the merits of the *motion to remand*". Plaintiffs unambiguously noted in their brief to the Fifth Circuit:

> Plaintiffs vigorously maintained that the motion to remand should only address the purely jurisdictional (threshold) question, i.e. whether the federal district court was the appropriate forum for entertaining this controversy, *it was not the appropriate time to adduce, evaluate, and judge facts that concerned the substance*

> *and merits of the claims.* Plaintiffs were negatively overwhelmed with the Court's apparent zeal to *dispose of their claim with inordinate haste.*
>
> Appellants Brief at 6 (emphasis added).

Therefore, the Fifth Circuit masks plaintiffs' real objection by ascribing it solely to the remand issue, which was not the crux of the problem. Consequently, the Fifth Circuit opinion appears to be a simple application of the *B., Inc.* and *Keating* procedure of piercing the pleadings for remand analysis when, in fact, it goes much farther.

Indeed, *B., Inc.* and *Keating* cannot be read to support the opinion below. *Keating*, for example, cautioned strongly against pretrying the case on a remand motion. *B., Inc.*, for its part, virtually railed against such a rush to judgment:

> A district court need not and should not conduct a full scale evidentiary hearing on questions of fact affecting the ultimate issues of substantive liability in a case in order to make a preliminary determination as to the existence of subject matter jurisdiction.
>
> 663 F.2d at 551.

In a footnote, the court added:

> [T]he trial court may hold an evidentiary hearing to resolve these limited questions of *jurisdictional fact.* However, *where the disputed factual issues relate to matters of substance rather than jurisdiction*, e.g. did the tort occur? was there a privilege? was there a contract? etc. *All doubts are to be resolved in favor of the plaintiff.*
>
> 663 F.2d at 551 N.14 (emphasis added).

By citing *B., Inc.* and ignoring this language, the Fifth Circuit in this case again pretends that no significant change has

occurred in its removal/remand procedure, which is not remotely correct. Not only were jurisdictional facts[1] assessed, but so were disputed substantive facts and they were resolved *against* plaintiffs.

These forbidden substantive areas are precisely the type of issues that the district court considered in these proceedings. Defendants submitted, and the court considered, a tremendous quantity of documentary evidence which did little more than traverse the factual allegations in plaintiffs' state court petition, support defendant's substantive and general denial of liability, and opine that plaintiffs' claim was ill-founded.

Allowing such a procedure to be mixed with the jurisdictional issue raised by a motion to remand shortcircuits Louisiana's entire civil judicial system and the procedural protection afforded its citizens. Trial by affidavit is no substitute for trial by jury, which has for so long been the hallmark of "even-handed justice". *See, e.g., Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1961). Summary judgment is a drastic device, it should not be granted when there are major contentions in dispute and the litigants rightful focus should be on jurisdictional facts. Moreover, summary judgment is wholly inappropriate when so little time for discovery has been allowed. *See e.g., National Life Insurance Co. v. Solomon*, 529 F.2d 59 (2nd Cir. 1975).

This devastating combination of a motion to remand and summary judgment is particularly menacing when, as in this case, the plaintiffs are not given sufficient time to develop the facts necessary to fend off the summary judgment.

In this case the district court's grant of summary judgment against plaintiffs was accompanied by a refusal to allow plaintiffs additional time for discovery. Plaintiffs alleged causes of action

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[1] The *B., Inc.* court explained what it meant by "jurisdictional facts": "Thus, where the removing party alleges that the named in-state defendant does not even exist. . .; or that there is a contested question of fact regarding the true domicile of the parties . . . the trial court may hold an evidentiary hearing to resolve these limited questions of jurisdictional fact. 663 F.2d at 551 N.14.

based in negligence and intentional misconduct. In such cases, where knowledge and intent are such prominent issues, the facts and evidence are most often in the hands and minds of the tortfeasors. When plaintiffs are denied sufficient opportunity to get at this evidence, their opposition to summary judgment is formalistic at best.

II.

The Fifth Circuit Procedure Will Create A Conflict Of Principles Of Federal Adjudication By Pitting The Expedited Remand Procedure Against The More Cautious Summary Judgment Procedure

The Fifth Circuit ruling in this case creates an irreconcilable dilemma for state court litigants whose case has been removed to federal court. All circuits, the Fifth Circuit included, have held that a plaintiff's delay in seeking remand may constitute a waiver of the right to remand. Indeed, certain bases for remand must be filed within 30 days of the notice of removal. *See* 28 U.S.C. 1447(c).

For example, *Harris v. Edward Hyman Co.*, 664 F.2d 943 (5th Cir. 1981) held:

> The record indicates that subsequent to the action being removed from the Chancery Court of Copia County, Harris [plaintiff] served on both Edward Hyman and the Union [defendants] Requests for Admissions, Requests for Production of Documents, and a set of Interrogatories. Harris also responded to Edward Hyman's Request for Production of Documents.
>
> Indeed, until the Motion to Remand was filed, the action proceeded as any other with Harris giving no indication that she was dissatisfied with her federal forum. ***These acts are consistent with a waiver of a litigant's right to seek a remand to state court and the district court could have found so.***
>
> 664 F.2d at 945 (emphasis added).

Accord: Johnson v. Odeco Oil and Gas Company, 679 F. Supp. 604, 605 (E.D. La. 1987) (plaintiff's failure to object to removal for ten months and his participation in discovery in the case in federal court constituted a waiver of his right to remand the case to state court); *Wade v. Fireman's Fund Insurance Company*, 716 F. Supp. 226, 228 (M.D. La. 1989) (plaintiff waived his right to remand by actively participating in discovery process and attending two status conferences); *Roberts v. Vulcan Material Company*, 558 F. Supp. 108, 109 (M.D. La. 1983) (either active participation by invoking this process of the federal court or a delay by the plaintiff in objecting to removal can constitute a waiver of defects in a removal petition); *Fristoe v. Reynolds Metal Company*, 615 F.2d 1209, 1212 (9th Cir. 1980) (although the defendant failed to file the removal petition timely, and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped from objecting to the untimeliness by sitting on his rights).

More directly, in *McKay v. Boyd Construction Company. Inc.*, 769 F.2d 1084 (5th Cir. 1985) the court held that a plaintiff could, by his conduct in a federal court proceeding, waive his right to remand a case despite the presence of a non-diverse defendant:

> Technically, Boyd's motion for removal should not have been granted in the first place. Although Section 1441 permits the removal of cases based on diversity jurisdiction, it does not apply to those cases where any defendant is a resident of the state in which the suit was brought. Boyd is a Mississippi corporation. *McKay, however, waived this defect by proceeding in federal court without objection.*
>
> 769 F.2d at 1086 (emphasis added).

See also Commercial Associates v. Silcon Gammino, Inc., 670 F. Supp. 461 (D.R.I. 1987) (plaintiffs' failure to prosecute their motion to remand within five and a half months constitutes a waiver of remand).

The clear federal adjudicative value operative in these cases is speed and expediency. Therefore, delay and development of the case, even by discovery, in the federal court may constitute a waiver of the right to remand.

Conversely, the clear value in the motion for summary judgment is caution and opportunity to develop the factual basis to support or oppose such motion.

For example, *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2nd Cir. 1968) said:

> The plaintiff typically has in his possession only the facts which he alleges in his complaint. Having little or no familiarity with the internal affairs of the corporation, he is faced with affidavits setting forth in great detail management's version of what actions were taken and what motives led affiants to take these actions. Since the facts in such a case are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff provide a ground for recovery, at least not without allowing discovery in order to provide plaintiff the possibility of counteracting the effect of defendants' affidavits.

See also Walters v. City of Ocean Springs, 626 F.2d 1317, 1321 (5th Cir. 1980) and *Slagle v. U.S.*, 228 F.2d 673, 678 (5th Cir. 1956) (summary judgment proponent's exclusive knowledge is a circumstance universally considered as giving the non-moving party a peculiar claim to delay sufficient for the orderly discovery and development of facts).

Indeed, Rule 56 itself recognizes in subsection (F) that continuances may be needed and granted "to permit affidavits to be obtained or depositions to be taken or discovery to be had" in order to allow opposing party a meaningful opportunity to defend the motion. In the instant case the district court denied plaintiffs' Rule 56(F) motion. See *also Waldron v. British Petroleum Company*, 231 F. Supp. 72, 94 (S.D. N.Y. 1964) [Rule

56(F) motions should be liberally granted . . . especially where . . . all of the allegedly material facts are within the exclusive knowledge of the opposing party).

The net result is that the plaintiff faced with removal/remand, after the opinion in the instant case, cannot possibly know how to proceed. Should he file his motion to remand quickly, as the statute and cases say he should, and thereby face a coupling of the removal with a summary judgment that he cannot possibly prepare to defeat. Or should he delay and gather the ammunition to defend the expected motion for summary judgment and possibly waive some or all of his arguments for remand. No one is well served by this dilemma. State courts lose control of cases rightfully before them. Federal courts appear heavy-handed and intrusive. Judicial economy is not well served because either remand proceedings will be delayed impermissibly or summary judgment will be accelerated unfairly. In either event further unnecessary litigation, especially appeals, will occur.

III.

The Fifth Circuit Procedure Frustrates The Values Of Judicial Economy, Convenience, Fairness And Comity

It has been noted above just how the instant case threatens important judicial values. However, to the foregoing conclusion can be added the voice of this Honorable Court speaking in the recent case of *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614 (1988). In *Cohill* this Court discussed another aspect of removal/remand dealing with pendent jurisdiction over a voluntarily dismissed federal claim, which removed all federal matters from the case. In deciding that a district court could remand such a case, this Court said: "[T]he values of economy, convenience, fairness and comity, would support remand since "[b]oth litigants and states have an interest in the prompt and efficient resolution of controversies based on state law". 108 S.Ct. at 620. These same values are not well served by a procedure that ostensibly tests jurisdiction, but in fact forces a premature trial of the merits by affidavits and severely limited discovery.

The federal judiciary has no interest in this matter beyond determining the fraudulent joinder question. If fraudulent joinder is found, the nondiverse plaintiffs should be dismissed under rule 12(b)(6). That matter is then ripe for appeal. To go beyond that is to wrest away from the litigants and the states matters of primary, and perhaps, exclusive interest to them.

IV.

The Courts Below Misconstrued Applicable Louisiana Law And Their Duty To Construe All Facts Most Favorably To Plaintiffs In Granting Summary Judgment

A.

Clearly, the district court and the Fifth Circuit did not construe all disputed facts in plaintiffs' favor with respect to William McInnis, decedent's co-employee. As the Fifth Circuit noted, there was a conflict between Mr. McInnis' affidavit and the affidavits of the investigating police officer. The McInnis affidavit, as cited by the court, says "that he [McInnis] saw Carriere leave the control room but had no knowledge where Carriere was going or that he was likely to be in danger". Slip opinion at 1874-75.

Yet, the court noted that the police officer's affidavit said that "McInnis told him after the incident that he 'should have' accompanied Carriere to the loading dock". *Id.* at 1875.

This constitutes a clear conflict on a substantive issue of fact. One affidavit, based upon statements made immediately after the incident, indicates that McInnis knew where decedent was going and that he *should* have gone with him. On the other hand, the subsequent McInnis affidavit, submitted long after the fact and in support of summary judgment, shows a McInnis who did know where decedent was going or that he might be in danger. Clearly, this is a credibility question undergirding a serious, critical factual dispute. Nonetheless, the Court resolved it in favor of defendant!

> The officer's affidavit, the only factual support for the plaintiffs' intentional act allegation, shows only that McInnis, after Carriere's tragic murder, wished he had accompanied Carriere to assist him.
>
> Slip opinion a 1875 (emphasis added).

To interpret McInnis' statement to the investigating officer as a mere wish, and thereby concluded that summary judgment should be granted to defendant is clearly to resolve the factual dispute in favor of *defendant*, contrary to the federal rules. This is apparent simply by noting that if the court had interpreted the word "should" as expressing an *obligation* rather than a wish, plaintiffs would have shown a *possibility* of a state cause of action.

Interestingly, *The American College Dictionary* (Random House) gives as its first definition of the word "should" the word *"shall"*! Similarly, *Black's Law Dictionary* defines should as: "The past tense of shall ... ordinarily implying *duty* or *obligation*. (Emphasis added). "Shall", then, is defined as a "word of command, and one which has always or which must be given compulsory meaning; as denoting obligation". *See also, Fegan v. Lykes Steam Ship Company*, 3 So.2d 632, 635 (La. 1941) interpreting should to "clearly imply *obligation*", (emphasis added).

Clearly, then, had the court below truly resolved factual disputes in favor of the non-removing party, it would have read Mr. McInnis' statement to the police officer as one recognizing his *obligation* – not his wish – to accompany the decedent to the loading dock. Once viewed as an obligation, the "possibility" of showing substantial certainty, and therefore intent, is clearly present. As the Louisiana Supreme Court said in *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981):

> Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from this

> act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.
>
> *Id.* at 482.

B.

The Fifth Circuit also erred in ruling that Sizeler Real Estate Management Company was also fraudulently joined, and in granting Sizeler summary judgment. In so doing, the court misconstrued *Harris v. Pizza Hut of Louisiana*, 455 So.2d 1364 (La. 1984), saying that in *Harris* "the Louisiana Supreme Court found that Pizza Hut assumed a duty to protect customers on its premises . . . ." Slip opinion at 1875. The Fifth Circuit then concluded that the "case before us has none of the features of *Harris*" since Sizeler had no *special relationship* with the decedent; nor was decedent a Sizeler patron.

This analysis overlooks the more widely accepted view of *Harris* represented in *Willie v. American Casualty Company*, 547 So.2d 1075 (La. App. 1st Cir. 1989), which was decided after the instant case was submitted, but which was supplied to the Fifth Circuit by plaintiffs' counsel's letter dated October 30, 1989.

In *Willie* the Louisiana First Circuit explicitly rejects the Fifth Circuit's view of *Harris*:

> We reject outright the contention that *Harris v. Pizza Hut*, 455 So.2d 1364 (La. 1984), limits the duty to protect one's business patrons so that the duty to protect can be breached *only* when a business has assumed such duty. In *Harris*, those were simply the facts: the duty had been assumed and was negligently performed. . . . Moreover, language in *Harris* indicates the contrary:
>
> > The issue of a business establishment's liability to a patron for criminal assault by a third party is discussed in *Banks v. Hyatt Corporation*, 722

> F.2d 214 (5th Cir. 1984). *Although, Banks dealt with an innkeeper's liability, any business which invites the company of the public must take "reasonably necessary acts to guard against the predictable risks of assault".*
>
> 547 So.2d 1082 (emphasis added).

The *Willie* court went on to conclude that foreseeable criminal conduct alone can create the duty of the owner to provide protection whether or not that duty had been voluntarily assumed:

> The issue here is whether the trial court's instruction that prior criminal activity may be taken into account to determine the foreseeability of a particular criminal act was error. We think not. *Implicit in the passages from Harris and Miles quoted hereinabove is that some level of criminal activity could impose a duty to post warnings or increase security because crime is foreseeable under what circumstances is a question of fact.*
>
> 547 So.2d at 1083 (emphasis partially added).

Willie, therefore, directly contradicts the Fifth Circuit's conclusion that there is no possibility of recovery against Sizeler because "the facts do not support the conclusion that Sizeler *assumed a duty* to protect Sears' property or personnel". Slip opinion at 1876 (emphasis added). Plaintiff need not supply such facts since assumption of a duty is not required by Louisiana law.

The Louisiana Fourth Circuit has also taken the *Willie* position in reversing a summary judgment for a defendant in an assault case. *Smith v. Walareens Louisiana Company, Inc.*, 542 So.2d 766 (La. App. 4th Cir. 1989) interprets *Harris* exactly as does the state First Circuit. Citing *Harris* the court concludes:

> First, "any business which invites the company of the public must take reasonably necessary acts to guard

> against the predictable risk of assaults". . . . One jurisprudential exception to this rule occurs when the plaintiff's injuries are caused by the unforeseeable or unanticipated criminal acts of third parties. . . . Secondly, once a Louisiana business has voluntarily assumed a duty of protection, that duty "must be performed with due care".
>
> 542 So.2d at 767.

Clearly, the Fourth Circuit read *Harris* to mean a duty to protect against criminal assault *may* exist independent of any voluntary assumption of such a duty.

The *Smith* court went on to say evidence of prior criminality would be relevant to determining the duty *vel non*, and such evidence could only be assessed in a trial:

> In light of the previous case law in this area, absent proof of specific incidents of crime *prior to*, not simply around the time of, plaintiff's attack, we are unable to say that this incident was foreseeable. The issue should be referred to the trial on the merits.
>
> 542 So.2d at 768 (emphasis by court).

Consequently, it is beyond argument that, based upon *Willie* and *Smith*, in at least two Louisiana circuits, including the one governing this case, plaintiffs' action against Sizeler would not meet with an adverse summary judgment such as granted by the Fifth Circuit.

This conclusion also applies to the court's dependence on the fact that Carriere was not a "patron" of Sizeler's. Both *Willie* and *Smith* reject this as a basis for rejecting a cause of action such as this under Louisiana law.

Smith, for example, says:

> The general rule is that commercial establishments have a duty to take reasonable precautions to protect against assaults *on their property*. . . . In most of the cases dealing with this issue, patrons were involved. However, if the plaintiff in the instant case had permission to park in the lot because her employer was extending consideration to the defendant, the relationship between the parties is very similar to the relationship between merchants and patrons since the merchant is gaining a benefit. The existence of a valid business relationship between the parties is therefore material to the determination of the existence of a duty on the part of defendant to protect the plaintiff from assault. *This issue must be determined before the motion for summary judgment can be properly granted.*
>
> 542 So.2d at 769 (emphasis added).

In the instant case, it is inappropriate to deny remand and grant summary judgment when the issue of the relationship between Carriere and Sizeler is in dispute, which means it should be resolved in favor of plaintiffs. Therefore, such a resolution would mean a relationship must be presumed thereby creating a clear *possibility* of recovery from Sizeler. *See, B., Inc., supra.*

Willie, on the other hand, is even more expansive on the point:

> We believe that it is of no moment that [plaintiffs] were not on Town and Country premises to patronize one of its businesses. The status of an individual injured on someone else's property has *long* been held not determinative of the duty owed. . . . It is because a shopping center like Town and Country is open to the *public*, without inquiry into the particular business concerns of persons entering the premises, that *the duty to protect members of the public entering the premises*, as recognized herein, *is imposed.*
>
> 547 So.2d at 1085 (emphasis partially added).

Willie went on to hold both the owners and manager of the shopping center liable for the criminal abduction and assault of plaintiffs who were not at the time "patrons" of the center.

In a diversity case the federal court is clearly obligated to apply Louisiana law as it believes a Louisiana court would interpret it if presented with the issue. See, *Mozeke v. International Paper Company*, 856 F.2d 722 (5th Cir. 1988). This is especially important in a remand case since to make a bad *Erie* guess unfairly and unnecessarily divests the state court of its rightful jurisdiction.

CONCLUSION

The U. S. Fifth Circuit has erred seriously in its ruling in the instant case. The results of this error not only affect the plaintiffs in this case, but also affect the entire ordering of state/federal relations in removal/remand matters. Moreover, the procedure approved by the Fifth Circuit will spawn massive additional litigation as plaintiffs try to guess whether they are better protected by a quick remand hearing or a more cautious development of summary judgment materials. Consequently, it is in the best interest of judicial economy, federalism, comity and, above all, fairness that this Court grant the instant writ to fully consider this matter.

Respectfully submitted,

GERTLER, GERTLER & VINCENT

BY: _____

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3089

D.C. Docket No. CA-88-974-M

THAIS CARRIERE, Widow of Samuel Carriere, IV
Individually and on Behalf of her Minor Child, et al.,

Plaintiffs-Appellants,

versus

SEARS, ROEBUCK AND COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before DAVIS and SMITH, Circuit Judges, and LITTLE*, District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 2, 1990

ISSUED AS MANDATE: MAR 12 1990

*District Judge of the Western District of Louisiana, sitting by designation.

Thais CARRIERE, Widow of Samuel Carriere, IV, Individually and on Behalf of her Minor Child, et al., Plaintiffs-Appellants,

v.

SEARS, ROEBUCK AND COMPANY, et al., Defendants-Appellees.

No. 89-3089.

United States Court of Appeals, Fifth Circuit.

Feb. 2, 1990.

Survivors of security guard, who was killed while investigating suspicious activity on employer's loading dock, brought wrongful death and survival action against employer, coemployee, owner of adjacent business premises, and real estate management firm which was hired to provide security for owner of adjacent premises. Action was removed. Survivors filed motion to remand. Employer, real estate management company, and owner of adjacent premises filed motions for summary judgment. The United States District Court for the Eastern District of Louisiana, Peter Beer, J., denied motion to remand and granted summary judgment motions. Survivors appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) employee was fraudulently joined to defeat federal jurisdiction; (2) real estate management company was fraudulently joined to defeat federal jurisdiction; (3) denial of motion for continuance to conduct discovery before hearing on summary judgment motions was not abuse of discretion; and (4) owner of adjacent business premises did not have duty to protect security supervisor from risk of criminal harm.

Affirmed.

Appeal from the United District Court for the Eastern District of Louisiana.

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

W. EUGENE DAVIS, Circuit Judge:

The survivors of Samuel Carriere appeal the removal and eventual dismissal of their wrongful death and survival actions against a number of defendants. We affirm.

I.

Samuel Carriere, a Sears, Roebuck and Company (Sears) security supervisor, was killed by unidentified assailants while he was investigating suspicious activity on the Sears loading dock. William McInnis, a part-time Sears security employee, was also on duty when the incident occurred.

The Sears store where this incident occurred is located in a shopping mall that is owned by a number of owners in distinct parcels. Sears owns the tract on which its store is located, and Connecticut General Life Insurance Company (Connecticut General) owns the adjoining tract. Sears handles its own security; Connecticut General contracted with Sizeler Real Estate Management Company (Sizeler), to provide the security on its property.

Carriere's survivors filed a state court action against McInnis, Sears, Connecticut General, and Sizeler. Two of the defendants, Sizeler and McInnis, were nondiverse. The diverse defendants removed the case and alleged that the plaintiffs had fraudulently joined the nondiverse defendants. Carriere made a timely motion to remand; Sizeler and Sears filed motions for summary judgment.

[1] District Judge for the Western District of Louisiana, sitting by designation.

The district court set a single hearing date for both the motion to remand and the motions for summary judgment. Before the hearing on these motions, the plaintiffs sought a continuance to conduct further discovery. The trial court, noting that it had granted two previous motions to continue the hearing, denied a further continuance and went forward with the hearing. Finding that the nondiverse defendants were fraudulently joined, the district court denied the motion to remand. The court then struck all of the plaintiffs' affidavits for various deficiencies and granted summary judgment to Sears and Sizeler.

The court also later granted Connecticut General's motion for summary judgment. Carriere's survivors in this appeal complain that the district court erred in: (1) denying their motion to remand; (2) refusing to continue the hearing to permit them to conduct further discovery; and (3) granting the summary judgment motions of Sizeler and Connecticut General.

II.

A.

[1] The plaintiffs first contend that the district court erred in denying the motion to remand.[3] In particular, the plaintiffs complain of the district court's ruling that defendants McInnis and Sizeler were fraudulently joined to defeat federal jurisdiction. In the plaintiffs' view, the district court should have accepted the factual allegations of the original state court petition and should not have considered affidavits and depositions in deciding the merits of the motion to remand.

While we have frequently cautioned the district courts against pretrying a case to determine removal jurisdiction, we have also

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[3] Appellees, relying on Ninth Circuit authority, contend that because Carriere's survivors did not seek interlocutory review of the district court's denial of their motion to remand, they are now foreclosed from seeking such review. See *Johnson v. Mutual Benefit Life Ins. Co.*, 847 F.2d 600, 602-03 (9th Cir. 1988); *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 798-99 (9th Cir.1987). Our circuit has not adopted this position. We consider the plaintiff's motion to remand sufficient objection to removal to preserve the point for later appeal after final judgment is entered. *Paxton v. Weaver*, 553 F.2d 936, 942 (5th Cir.1977).

endorsed a summary judgment-like procedure for disposing of fraudulent joinder claims. In *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir.1981), we carefully discussed the procedures for assessing fraudulent joinder claims and noted that "the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment. . . ." *Id.* at 549 n. 9. The *B. Inc.* court expressly authorized consideration of evidence outside of the pleadings:

> In support of their removal petition, the defendants may submit affidavits and deposition transcripts; and in support of their motion for remand, the plaintiff may submit affidavits and deposition transcripts along with the factual allegations contained in the verified complaint.

Id. at 549. Similarly, in *Keating v. Shell Chemical Co.*, 610 F.2d 328 (5th Cir.1980), we approved "piercing the pleadings" to determine controlling state law for purposes of resolving fraudulent joinder questions. We remanded that case for a determination "[b]y summary judgment or otherwise" whether joinder was fraudulent. *Id.* at 333.

[2] In short, this circuit treats fraudulent joinder claims as capable of summary determination. When determining fraudulent joinder, the district court may look to the facts as established by summary judgment evidence as well as the controlling state law. Hence, the trial court properly considered affidavits and depositions in ruling on the plaintiffs' motion to remand. We now turn to the plaintiffs' argument that the district court erred in determining that the non-diverse parties were fraudulently joined.

B.

[3,4] The removing party bears the burden of demonstrating fraudulent joinder. *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir.1989). The diverse defendants in this case contend that the non-diverse defendants, McInnis and Sizeler, were fraudulently joined because the plaintiff had no possibility of obtaining judgment against them. The standard for judging fraudulent joinder claims of this sort is clearly established in

this circuit: After all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the non-removing party, the court determines whether that party has any possibility of recovery against the party whose joinder is questioned. *B., Inc. v. Miller Brewing Co.*, 663 F.2d at 551. We will examine defendants' claim of fraudulent joinder against each non-diverse party in turn.

1. McInnis

[5] The defendants contend that joinder of William McInnis was fraudulent because McInnis, as Samuel Carriere's co-employee, is entitled to tort immunity under the Louisiana workers' compensation scheme. See La.Rev.Stat.Ann. § 23:1032. The plaintiffs argue that McInnis is not entitled to tort immunity because he committed an intentional act. We agree with the district court that the plaintiffs could not possibly recover against McInnis and that McInnis was therefore fraudulently joined.

An intentional act for purposes of Louisiana workers' compensation immunity means an intentional tort. *Bazley v. Tortorich*, 397 So.2d 475, 480 (La.1981). To prove "intent" under Louisiana law, the plaintiff must at least prove that the actor was substantially certain that harmful consequences would result from his conduct. *Mayer v. Valentine Sugars, Inc.*, 444 So.2d 618, 621 (La.1984).

The plaintiffs' original state court petition included an allegation that McInnis was "substantially certain" that his inaction would result in harm to Carriere. But McInnis, in his affidavit, stated that he saw Cariere leave the control room but had no knowledge where Carriere was going or that he was likely to be in danger. In opposition to this affidavit, plaintiffs rely on the affidavit of the police officer who investigated Carriere's murder. According to the officer, McInnis told him after the incident that he "should have" accompanied Carriere to the loading dock.

Construing, as we must, all disputed facts in the plaintiffs' favor, we still find no possibility of recovery by plaintiffs against

McInnis on an intentional tort theory. The officer's affidavit, the only factual support for the plaintiffs' intentional act allegation, shows only that McInnis, after Carriere's tragic murder, wished he had accompanied Carriere to assist him. This is not enough to allow a factfinder to infer that McInnis knew or was substantially certain that harm would befall Carriere. See *Kent v. Joma Products, Inc.*, 542 So.2d 99, 100-01 (La.App. 1st Cir.1989); *Davis v. Southern Louisiana Insulations*, 539 So.2d 922, 924 (La.App.1989).

Thus, viewing the facts most favorably to the plaintiffs, they could not possibly recover from McInnis. We therefore agree with the trial court that McInnis was fraudulently joined.

2. Sizeler

[6] The plaintiffs also sued Sizeler Real Estate Management Company on a theory that Sizeler failed to take reasonable measures to protect Carriere against a threat of criminal harm. Ordinarily, Louisiana law imposes no duty to protect against the criminal acts of third person. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La.1984). However, a duty to protect against foreseeable criminal misconduct may arise from a special relationship. For example, an innkeeper may be required, under some circumstances, to take reasonable measures to protect its guests against criminal activity. *Banks v. Hyatt*, 722 F.2d 214 (5th Cir.1984). Likewise, business owners must take reasonable steps to protect those who enter their premises from the foreseeable criminal acts of others. See *Harris*, 455 So.2d at 1369.

The plaintiffs do not argue that a special relationship existed between Sizeler and Sears security employees such as Carriere. However, relying on *Harris v. Pizza Hut, supra*, the plaintiffs contend that because Sizeler guards crossed Sears' property during its patrol, had handled unspecified criminal incidents there, had changed light bulbs on the Sears lot, and had control over the source of power for Sears' parking lot lights, Sizeler assumed a duty to protect Carriere against criminals.

Carriere's reliance on *Harris* is misplaced. In *Harris*, the Louisiana Supreme Court found that Pizza Hut assumed a duty to protect customers on its premises when it provided a security guard. The case before us has none of the features of *Harris*. Sizeler had no relationship, special or otherwise, with Carriere. Carriere was not a Sizeler patron. Carriere was not on Sizeler's "premises" when he was killed, but instead was on Sears' premises, which he had been hired to protect.

Most importantly, in *Harris*, the business owner had taken affirmative action to protect its patrons by hiring a security guard for that purpose. By contrast, the plaintiffs' evidence, viewed as favorably to them as possible, shows only that Sizeler personnel occasionally crossed the Sears parking lot and had some minimal involvement with lighting the entire parking area including that allotted to Sears.

This conduct by Sizeler employees is compatible with its efforts to protect Connecticut General's property as required by Sizeler's contract with Connecticut General. The facts do not support the conclusion that Sizeler assumed a duty to protect Sears property or personnel. See *Kane v. Braquet*, 368 So.2d 1176, 1182 (La.App.), *writ denied*, 369 So.2d 1366 (La.1979)(company did not assume a duty to protect third persons from criminal attack simply by taking security measures solely for its own benefit). The district court correctly concluded that the plaintiff had no possibility of recovering from Sizeler and that Sizeler was therefore fraudulently joined.

III.

Appellants next raise a number of objections to the district court's rulings on appellees' motions for summary judgment.

A.

[7] The plaintiffs first argue that they had inadequate opportunity to conduct discovery before the hearing on the motions for summary judgment filed by Sears and Sizeler. The plaintiffs contend that under Rule 56(f), the district court should have

granted them additional time to complete discovery before the summary judgment hearing. Denial of a continuance under Rule 56(f) is governed by an abuse of discretion standard. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir.1986). We find no abuse of discretion.

This case was removed to federal court over four months before the hearing on the motions for summary judgment. The record reveals that the plaintiffs took little or no action toward completing discovery during this time.

The plaintiffs did not explain to the district court why they had not completed discovery in the time already allotted. The only justification the plaintiffs offered for an additional delay was that the district court had not yet ruled on the motion to remand. The plaintiffs were not, however, entitled to have the trial judge rule on the motions in any particular order. Therefore, the fact that a motion for remand was pending does not excuse failing to pursue discovery diligently. Under these circumstances, the district court did not abuse its discretion in denying the plaintiffs a further continuance.

B.

[8] Finally, the plaintiffs contend that Sizeler and Connecticut General were not entitled to summary judgment. To uphold a summary judgment, we must find that no genuine issue of material fact remained for trial and that judgment was proper as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Because we have already concluded that Sizeler was fraudulently joined, we need not consider appellant's argument on this point further. Summary judgment will always be appropriate in favor of a defendant against whom there is no possibility of recovery.

We also find that all of the plaintiffs' theories against Connecticut General are deficient. The plaintiffs first argue that Connecticut General could be vicariously liable for Sizeler's

negligence. Since we have already determined that Sizeler owed no duty to Carriere, it is clear that no vicarious liability for Sizeler's fault would flow to Connecticut General.

Plaintiffs next argue that Connecticut General somehow assumed responsibilty for security in the Sears loading area, and thereby assumed a duty to protect Carriere against criminal acts of others. But the plaintiffs offered no summary judgment evidence to support this argument. The available summary judgment evidence refutes this contention.

[9] The plaintiffs' final argument seems to be that as the owner of a business premises, Connecticut General owed a duty to protect Carriere, the security guard on an adjacent premises, from the risk of criminal harm. We have already noted that Louisiana law under some circumstances imposes a duty on owners of business places to protect others against the risk of criminal harm. However, that duty has been extended beyond the actual business premises only in very rare circumstances, and then only when some specific relationship existed between the plaintiff and the defendant. See *Banks v. Hyatt*, 722 F.2d 214 (5th Cir.1984). See also *Weldon v. Great Atlantic & Pacific Tea Co.*, 818 F.2d 459, 461 (5th Cir.1987). Because Carriere was not on the Connecticut General premises when he was attacked, and because no special relationship existed between Carriere and Connecticut General, Connecticut General owed no duty to Carriere. Connecticut General was therefore entitled to judgment in its favor as a matter of law.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-3089

THAIS CARRIERE, Widow of Samuel Carriere, IV, Individually and on Behalf of Her Minor Child, ET. AL.,

Plaintiffs-Appellants,

versus

SEARS, ROEBUCK AND COMPANY, ET. AL.,

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(March 2, 1990)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

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[1] District Judge for the Western District of Louisiana, sitting by designation.

MINUTE ENTRY
BEER, J.
JULY 15, 1988

UNITED STAES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	CIVIL ACTION
VERSUS	NO. 88-974
SEARS, ROEBUCK AND CO., ET AL	SECTION: M

This matter came befor the Court for hearing on July 13, 1988 and was taken under submission. Presently before the Court are the following motions:

1. Plaintiff's motion to remand the case to the Civil District Court, Parish of Orleans, of the State of Louisiana;

2. Defendants', Sizeler Realty Co and Sizeler Real Estate Management Co., Inc., motion for summary judgment;

3. Defendants', Sears, Roebuck and Co. and Connecticut General Life Insurance Co., motion for summary judgment

4. Defendant's, Sears, Roebuck and Co., motion to strike affidavits.

Upon consideration of the memoranda and accompanying documents, as well as, oral arguments of counsel, the Court makes the following findings. The motion to strike affidavits is hereby GRANTED. The motions for summary judgment are hereby GRANTED. The Court finds that the only unresolved matter remaining at this time is the Louisiana State Workman's Compansation claim, which alone, is hereby REMANDED to the Civil District Court, Parish of Orleans, of the State of Louisiana.

/s/Peter Beer

MINUTE ENTRY
BEER, J.
29 AUGUST 1988

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	CIVIL ACTION
VERSUS	No. 88-0974
SEARS, ROEBUCK AND COMPANY, ET AL	SECTION: M

This matter came before the Court on the motion of plaintiffs for relief from the Minute Entry of July 15, 1988 which struck the plaintiffs' affidavits and granted defendants' motions for summary judgment. Also before the Court is the joint motion of Sears, Roebuck and Company, Sizeler Realty Company, Sizeler Real Estate Managment Company, and Connecticut General Life to amend the Minute Entry of July 15, 1988.

Upon consideration of the legal memoranda submitted, the oral argument of counsel, the record, and the applicable law, the motion of plaintiffs to reconsider the Court's ruling to strike plaintiffs' affidavits and to grant summary judgment in behalf of defendants is DENIED.

The Court does recognize the need to clarify certain matters in the Minute Entry of July 15, 1988. Thus, that Minute Entry is amended to read as follows:

> "Before this Court are the motion filed by plaintiffs to remand this matter the state court, the motion for summary judgment of defendants, Sizeler Realty Company and Sizeler Real Estate Management Company, Inc., the motion for summary judgment filed by Sears, Roebuck and Company, and the Motion urged by Sears, Roebuck and Company to strike the plaintiffs' affidavits.

Upon consideration fo the legal memoranda, the oral argument of counsel, the record, and the applicable law, the motion to remand is DENIED. The motions for summary judgment filed by Sizeler Realty and Sizeler Real Estate Management Company and Sears, Roebuck and Company are GRANTED. The motion to strike the affidavits is GRANTED."

/s/Peter Beer

MINUTE ENTRY
BEER, J.
OCTOBER 24, 1988

UNITED STAES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL	CIVIL ACTION
VERSUS	NO. 88-974
SEARS, ROEBUCK AND CO., ET AL	SECTION: M

Defendants Allstate Insurance Company and William McInnis have noticed for hearing on Wednesday, October 26, 1988 their motion to dismiss. However, these defendants have previously filed this identical motion. *See* Motion to Dismiss William McInnis and Allstate Insurance Company (filed July 29, 1988). On August 24, 1988 at 9:30 a.m., all parties had the opportunity to orally argue the motion. Thereafer, this Court took the matter under consideration. Although the Court in an August 30, 1988 minute entry disposed of other motions heard on August 24th, it did not resolve Allstate and McInnis' motion to dismiss. Because that motion remains under consideration, it is unnecessary for the parties to reargue it. Therefore, oral argument set for October 26th on defendants' renoticed motion is CANCELLED.

/s/Peter Beer

MINUTE ENTRY
BEER, J.
OCTOBER 31, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, ET AL SAMUEL CARRIER, IV, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, RICHARD DARCEY CARRIER, SAMUEL CARRIERE, V., LEANORA PAIGE CARRIER TOMENY, THAIS MARIE CARRIERE, AND CLAYTON JOSEPH CARRIERE	CIVIL ACTION NO. 88-974
VERSUS	
SEARS ROEBUCK AND COMPANY, SIZELER REALTY CO., CONNECTICUT GENERAL LIFE INSURANCE CO., ON BEHALF OF ITS SEPARATE ACCOUNT R, BILL MCINNIS AND ALLSTATE INSURANCE CO.	 SECTION M

Plaintiffs are the survivors of a security guard who was murdered while on duty at Sears, Roebuck and Co. ("Sears"). The plaintiffs originally filed a damage suit against numerous defendants in Orleans Parish Civil District Court. The defendants then removed the case to the federal court.[1]

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[1] The court denied plaintiffs' Motion to Remand filed March 23, 1988. *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988. In that motion, the plaintiffs maintined that jurisdiction in this court was improper because of the lack of complete diversity. *See* 28 U.S.C. § 1332; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The Court, however,

(Footnote continued)

This court granted summary judgment in favor of defendants Sizeler Realty Company, Sizeler Real Estate Management Company, Inc., and Sears. *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988. Defendant Allstate Insurance Company's ("Allstate") now moves to dismiss itself and defendant William McInnis from the suit. The court heard oral argument on this motion on August 24, 1988 and took the matter under consideration. Inadvertently, it has remained so until now.[2]

I. *Opinion*

A. *Defendant William McInnis*

Allstate moves under Rule 12(b) to dismiss defendant William McInnis for the plaintiffs' failure to comply with Federal Rule of Civil Procedure 4(j). That rule provides in part as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action ***shall*** be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P. 4(j) (emnphasis added).

Allstate's motion is meritorious. The plaintiffs filed suit in Orleans Parish Civil District Court on February 3, 1988. The defendants removed to this court on March 7, 1988. As of August

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The court, however, denied plaintiffs' motion because it found that their joinder of defendant McInnis was clearly and convincingly fraudulent. That is, the plaintiffs' claim against McInnis (which defeated complete diversity), was neither based on existing Louisiana law nor in fact. *See Keating v. Shell Chemical Co.*, 610 F.2d 328, 330-32 (5th Cir. 1980).

[2] This court issued a minute entry on August 29, 1988 that disposed of other motions argued on August 24, 1988.

24, 1988, the plaintiffs still had not served defendant McInnis with a summons and complaint. Plaintiffs are clearly delinquent. Moreover, they have not presented "good" reason why this court should excuse their delinquency. *Id.* Therefore, the court must grant defendant Allstate's motion to dismiss defendant William McInnis for noncompliance with Rule 4(j).[3]

B. *Defendant Allstate*

Defendant Allstate also moves for a dismissal under Rule 12. Nevertheless, this court can consider matters outside of the pleadings and treat the Rule 12 motion "as one for summary judgment" since all parties have had a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

1. *Standard for Summary Judgment*

Federal Rule of Civil Procedure 56(c)[4] governs summary judgment. That rule "mandates the entry of summary judgment,

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[3] Alternatively, the court, finding adequate notice to the defendant William McInnis and to the plaintiffs, dismisses defendant William McInnis on its own motion for the plaintiffs' noncompliance with Rule 4(j). *See* Fed. R. Civ. P. 4(j) ("action shall be dismissed . . . upon the court's own initiative with notice to such party or . . . .").

Despite plaintiffs' contention, *see* Plaintiffs' Second Supplemental Memorandum in Opposition to Allstate's Motion to Dismiss William McInnis and Allstate Insurance Co. at 2, the fact that this court denied plaintiffs' previous Motion to Remand, does not render this motion moot. Perhaps it would have been "neater" had this court dismissed McInnis on its own motion when it denied Plaintiffs' Motion to Remand. However, that this court chose not to do so, does not render the present motion moot. *See Chevron U.S.A., Inc.* v. *Aguilland*, 496 F. Supp. 1038, 1040-42 (M.D. La. 1980) (while the court denied motion to remand because of fraudulent joiner, it did not dismiss the fraudulently joined defendant). To the contrary, it bolsters this court's present dismissal of McInnis.

[4] Rule 56(c) expressly states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c).

after adequate time for discovery[5] and upon motion, against a party who fails to make a showing sufficient to establish the existence of a [material fact] . . . which that party [must prove] at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986) (citing Fed. R. Civ. P. 56(c)).

a. *Materiality.*—The controlling substantive law governs which facts are material. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Only disputes "over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Others are irrelevant.

b. *Genuineness.*—Summary judgment "will not lie if the dispute about a material fact is "genuine." *Id.* The Supreme Court considers a dispute "genuine" if the evidence is such that a reasonable jury could return a verdict on that issue for "either party." *Id.* at 2511.

When, as here, the movant is the defendant,[6] the *movant* initially need only make a " 'showing'—that is, pointing out to the District Court—that there is an *absence of evidence* to support the nonmoving party's [the plaintiff's] case." *Celotex* 106 S.Ct. at 2554 (emphasis added); *see also id.* at 2557 (Brennan, J., dissenting); *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manuf. Co.*, 812 F.2d 219, 222 (5th Cir. 1987); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986). However, a "showing" is more than a conclusory allegation; the movant must affirmatively demonstrate the absence of evidence in the record. *Id.* at 2553; *id.* at 2557 (Brennan, J., dissenting). But in no event must the

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[5] If it appears that the nonmoving party is being " 'railroaded' by a premature motion for summary judgment," the court should deny the motion, or continue it until the nonmoving party has adequate opportunity to make full discovery. Fed. R. Civ. P. 56(f); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554-55 & 2554 n.6 (1986).

[6] Or, more properly, when the movant does *not* bear the burden of proof on that issue at trial.

movant produce affidavits or other new evidence negating the nonmovant's claim. *Id.* at 2553.

If the defendant-movant successfully makes such a "showing," the plaintiff-nonmovant may oppose the motion with any of the kinds of evidence listed in Rule 56(c).[7] *Id.* at 2553-54. The nonmovant need not produce admissible evidence. *Id.* However, the nonmovant must go beyond the pleadings to designate specific disputed facts; the nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 106 S. Ct. at 1356. If the plaintiff fails to do so, the court must grant summary judgment.

If the plaintiff-nonmovant *does* make the requisite "showing," however, the court then must decide by a preponderance whether summary judgment is appropriate. The *defendant-movant* has the burden of proving that there is no genuine issue of fact, *Anderson*, 106 S. Ct. at 2514, and that it is entitled to judgment as a matter of law. *Id.*; *see also Williams v. Adames*, 836 F.2d 958, 960 (5th Cir. 1988); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir. 1986).

2. *Summary Judgment Standard Applied*

a. *Materiality.*—Whether Allstate insured McInnis is clearly a material issue. That is, it is a fact that will "affect the outcome of the [plaintiffs'] suit [against Allstate] under [Louisiana] law. . . ." *See Anderson*, 106 S. Ct. at 2510.

b. Genuineness.—Allstate has submitted affidavits showing that it was not the insurer of William McInnis for the liability asserted in this suit. The plaintiffs have submitted no contrary evidence to create a material issue of fact regarding insurance coverage. Because the plaintiffs have had adequate time to conduct discovery, *see* Fed. R. Civ. P. 56(f), Allstate is entitled to summary judgment.[8]

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[7] *See supra* note 4.

[8] Alternatively, Allstate's liability is derivative and dependent upon the plaintiffs' claims against McInnis. However, those claims are baseless. *See supra* note 1. Because the court has previously dismissed the plaintiffs' claims against McInnis, Allstate is entitled to summary judgment.

II. *Order*

After considering the memoranda submitted by counsel, their oral arguments, the record, and the applicable law, IT IS ORDERED that defendant William McInnis is DISMISSED. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that summary judgment is GRANTED in favor of defendant Allstate.

/s/Peter Beer

Peter Beer
United States District Judge

MINUTE ENTRY
BEER, J.
12/20/88

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, WIDOW OF SAMUEL CARRIER, IV, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, RICHARD DARCEY CARRIER, SAMUEL CARRIERE, V., LEANORA PAIGE CARRIER TOMENY, THAIS MARIE CARRIERE, AND CLAYTON JOSEPH CARRIERE — CIVIL ACTION

NO. 88-974

VERSUS

SEARS ROEBUCK AND COMPANY SIZELER REALTY CO., CONNECTICUT GENERAL LIFE INSURANCE CO., ON BEHALF OF ITS SEPARATE ACCOUNT R, BILL MCINNIS AND ALLSTATE INSURANCE CO.

SECTION M

OPINION AND ORDER

I. *Background*

A. *Procedural Posture*

The court originally heard oral arguments on this motion on November 16, 1988. At that time, the court continued the motion until Decemebr 14, 1988 so that the plaintiffs could conduct additional discovery.

B. *Facts*

Plaintiffs are the survivors of a security guard who was murdered while on duty at Sears, Roebuck & Co. ("Sears"). The

plaintiffs originally filed a damage suit against numerous defendants in Orleans Parish Civil District Court. The defendants then removed he case to this court.[1]

This court previously granted summary judgment in favor of the following defendants: (1) Sears, (2) Sizeler Realty Company, (3) Sizeler Real Estate Management Company, Inc.,[2] and (4) Allstate Insurance Company.[3] The court also dismissed defendant William McInnis for improper service of process.[4] The only defendant that remains is the owner of the Plaza Shopping Center, Connecticut General Insurance Company ("Connecticut General"). It now moves for summary judgment.

C. *The Present Motion*

1. *Defendant-Movant's Position.* – Connecticut General argues that it is neither responsible (1) for providing security on Sears' property, nor (2) for "controlling the work environment of Sears' employee, Samuel Carriere." Connecticut General's Memorandum in Support of Summary Judgment at 3 [hereinafter Defendant's Memo]. In short, Connecticut General argues that it neither owned the property on which Carriere was murdered, nor was responsible for security or lighting on the property.

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[1] The court denied plaintiffs' Motion to Remand filed March 23, 1988. *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988. In that motion, the plaintiffs maintained that jurisdiction in this court was improper because of the lack of complete diversity. *See* 28 U.S.C. § 1332; *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The court, however, denied plaintiffs' motion because it found that their joinder of defendant McInnis was clearly and convincingly fraudulent. That is, the plaintiffs' claim against McInnis (which defeated complete diversity), was neither based on existing Louisiana law nor in fact. *See Keating v. Shell Chemical Co.*, 610 F. 2d 328, 330-32 (5th Cir. 1980).

[2] *See* Minute Entry of July 15, 1988 as amended by Minute Entry of August 29, 1988.

[3] *See* Minute Entry of October 31, 1988.

[4] *Id.*

2. *Plaintiff's Opposition.* — The plaintiffs counterargue that summary judgment is improper because there remain unresolved disputes over material facts. Namely, they assert that Connecticut General had assumed the responsibility for lighting and patrolling the Sears parking lot. To support this contention, the plaintiffs submit the affidavits of two individuals who attest that they have seen Sizeler personnel working in the Sears parking area. They also submit deposition testimony purportedly suggesting that Connecticut General had assumed the responsibility for security and lighting at the Sears facility.

II. *Opinion*

A. *Standard for Summary Judgment*

Federal Rule of Civil Procedure 56(c)[5] governs summary judgment. This rule "mandates the entry of summary judgment, after adequate time for discovery[6] and upon motion, against a party who fails to make a showing sufficient to establish the existence of a [material fact] . . . which that party [must prove] at trial." *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986) (citing Fed. R. Civ. P. 56(c)).

1. *Materiality* — The controlling substantive law governs which facts are material. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Only disputes "over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Others are irrelevant.

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[5] Rule 56(c) expressly states that summary judgment is proper "if the pleading, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of low." Fed. R. Civ. p. 56(c).

[6] If it appears that the nonmoving party is being " 'railroaded' by a premature motion for summary judgment," the court should deny the motion, or continue it until the nonmoving party has adequate opportunity to make full discovery. Fed. R. Civ. P. 56(f); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554-55 & 2554 n. 6 (1986).

2. *Genuineness.* – Summary jugdment "will not lie if the dispute about a material fact is "genuine." *Id.* The Supreme Court considers a dispute "genuine" if the evidence is such that a reasonable jury could return a verdict on that issue for "either party." *Id.* at 2511.

When, as here, the movant is the defendant,[7] the *movant* initially need only make a " 'showing' – that is, pointing out to the District Court – that there is an *absence of evidence* to support the nonmoving party's [the plaintiff's] case." *Celotex* 106 S. Ct. at 2554 (emphasis added); *see also id.* at 2557 (Brennan, J., dissenting); *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manuf. Co.*, 812 F.2d 219, 222 (5th Cir. 1987); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986). However a "showing" is more than a conclusory allegation; the movant must affirmatively demonstrate the absence of evidence in the record. *Id.* 2553; *id.* at 2557 (Brennan, J., dissenting). But in no event must the movant produce affidavits or other new evidence negating the nonmovant's claim. *Id.* at 2553.

If the defendant-movant successfully makes such a "showing," the plaintiff-nonmovant may oppose the motion with any of the kinds of evidence listed in Rule 56(c).[8] *Id.* at 2553-54. The nonmovant need not produce admissible evidence. *Id.* However, the nonmovant must go beyond the pleadings to designate specific disputed facts; the nonmovant must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita,* 106 S. Ct. at 1356. If the plaintiff fails to do so, the court must grant summary judgment.

If the plaintiff-nonmovant *does* make the requisite "showing," however, the court then must decide by a preponderance whether summary judgement is appropriate. The *defendant-movant* has

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[7] Or, more properly, when the movant does *not* bear the burden of proof on that issue at trial.

[8] *See supra* note 1.

the burden of proving that there is no genuine issue of fact, *Anderson*, 106 S. Ct. at 2514, and that it is entitled to jugement as a matter of law. *Id.; see also Williams v. Adames*, 836 F. 2d 958, 960 (5th Cir. 1988); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir. 1986).

B. *Summary Judgement Standard Applied*

1. *Materiality.*—In order to recover from Connecticut General under Louisiana law, plaintiffs must prove either of the following: (1) that Connecticut General was the owner of the property on which Mr. Carrier was murdered, *see, e.g., Landry v. St. Charles Inn., Inc.*, 446 So. 2d 1246 (La. Ct. App. 4th Cir. 1986); *Banks v. Hyatt Corporation*, 722 F.2d 214 (5th Cir. 1984), or alternatively, (2) that Connecticut General (or its agent Sizeler), was contractually responsible to Sears for security and lighting at the sight of the murder, *see Washington v. Degelos*, 312 So. 2d 918 (La. Ct. App. 1975). These facts are material because they will "affect the outcome of the [plaintiffs'] suit [against Connecticut General] under [Louisiana] law . . . ." *Anderson*, 106 S. Ct. at 2510.

2. *Genuineness.*—Connecitcut General has submitted evidence indicating that it is not the owner of the property upon which Mr. Carriere was murdered. The plaintiffs have submitted no contrary evidence. Therefore, there exists no genuine issue of fact regarding ownership. Connecticut General would be entitled to summary judgment on this issue alone. However, because plaintiffs have alleged an alternative basis of liability, the court must look to the genuineness of the issues underlying that claim.

Connecticut General maintains that there is no evidence in the record suggesting that it (or its agent Sizeler) ever contracted with Sears to provide security servies. This "showing" is sufficient to shift the burden of production to the plaintiff. *See Celotex*, 106 S. Ct. at 2554.

Plaintiff counters with affidavits and deposition testimony purportedly inferring that Connecticut General agents were

contractually responsible for securing and lighting the Sears parking lot prior to Mr. Carriere's death. Plaintiff further maintains that these affidavits and depositions suggest that Connecticut General had actually assumed such security responsibilities.

The court finds, however, that this evidence is insufficient to raise an inference that genuine disputes remain. Connecticut General has, therefore, carried its burden or proving (1) that there is no genuine issue of fact, and (2) that it is entitled to summary judgment as a matter of law. *Id.* at 2514. Accordingly, the court must grant the defendant's summary judgement motion.

III. *Order*

After considering the record, the memoranda submitted by counsel, and the applicable law, defendant Connecticut General's Motion for Summary Judgement is **GRANTED**. Connecitcut General is **ORDERED** to prepare and submit a judgment consistent with this minute entry.

/s/ Peter Beer

Peter Beer
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THAIS CARRIERE, WIDOW OF SAMUEL CARRIERE, IV, individually and on behalf of her minor child, RICHARD DARCEY CARRIER, SAMUEL CARRIERE, V, LEANORA PAIGE CARRIER TOMENY, THAIS MARIE CARRIERE, AND CLAYTON JOSEPH CARRIERE	* CIVIL ACTION * NO. 88-0974 * SECTION "M" * MAG. DIV. (6)
VERSUS	*
SEARS ROEBUCK AND COMPANY SIZELER REALTY CO., CONNECTICUT GENERAL LIFE INSURANCE CO., ON BEHALF OF ITS SEPARATE ACCOUNT R, BILL MCCINNIS AND ALLSTATE INSURANCE COMPANY	*

* * * * * * * * * *

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT OF CONNECTICUT GENERAL LIFE INSURANCE COMPANY

Considering the motion for summary judgment of defendant, Connecticut General Life Insurance Company, the record, the memoranda submitted by counsel and the applicable law, and being of the opinion that there are no genuine issues of material fact and that defendant, Connecticut General Life Insurance Company, is entitled to summary judgment as a matter of law pursuant to Federal Rule of Civil Procedure 56 for the reasons set forth in the minute entry herein, dated December 20, 1988;

IT IS ORDERED that the plaintiffs' complaint and all claims asserted therein against defendant, Connecticut General Life Insurance Company, are dismissed, with prejudice, at plaintiffs' costs.

New Orleans, Louisiana, this 6th day of January 1989.

UNITED STATES DISTRICT JUDGE

Respectfully submitted,

MONTGOMERY, BARNETT, BROWN,
READ, HAMMOND & MINTZ

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that on this 6th day of January, 1989, I served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing same by first class United States mail, postage prepaid and properly addressed.

ROBERT E. DURGIN

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